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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 529

UNITED STATES, PETITIONER

v.

CARLO BIANCHI AND COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The findings and opinion of the United States Army Corps of Engineers Claims and Appeals Board (R. 167–177) are not reported. The opinion of the Court of Claims on January 14, 1959 (R. 222–228) is reported at 144 C. Cl. 500, 169 F. Supp. 514. The opinion of the Court of Claims on May 19, 1962 (R. 264–265) is not yet reported.

JURISDICTION

The final judgment of the Court of Claims was entered on May 19, 1962 (R. 264). A timely motion for reconsideration was denied on July 18, 1962 (R. 305). The petition for a writ of certiorari was filed

on October 15, 1962, and granted on December 17, 1962 (R. 306). The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether in a suit against the United States on a government contract the claimant is entitled to present evidence *de novo* on an issue of fact submitted to administrative determination pursuant to a standard disputes clause, despite the statutory provision that the administrative "decision shall be final and conclusive unless the same is * * * capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence."

STATUTORY AND CONTRACT PROVISIONS INVOLVED

1. The Act of May 11, 1954, 68 Stat. 81 (the Wunderlich Act), 41 U.S.C. 321-322) provides:

> § 321. Limitation on pleading contract-provisions relating to finality; standards of review.
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraud-

ulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. Contract-provisions making decisions final on questions of law.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2/ The "disputes clause" (Article 15) of the contract here involved provided (R. 230):

> Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

STATEMENT

This case arose out of a construction contract with the United States containing a standard disputes clause which makes final the administrative determination of disputed facts. Respondent claimed that it incurred extra expenses as the result of changed conditions. The Board of Claims and Appeals of the U.S. Army Corps of Engineers resolved the disputed facts against respondent and therefore rejected respondent's contention. Respondent sued for the

amount of expenses in the Court of Claims which held, on the basis of evidence presented *de novo* before it and not introduced before the Board, that the Board's factual findings were not supported by substantial evidence (R. 227).

1. *The Undisputed Facts.*—On July 3, 1946, respondent was awarded a contract by the U.S. Army Corps of Engineers for the construction of an earthen, flood-control dam across Canacadea Creek, in Almond, Steuben County, New York (R. 228–229, 127). The estimated contract price was $3,330,330, based upon unit prices for each category of work. The work was to be performed in 900 days (by March 29, 1949) in accordance with schedules, specifications, and drawings which had been prepared by the Corps of Engineers and examined by respondent before it made its bid (R. 229). The contract included (Article 15) the standard disputes clause calling for determination of all factual disputes by the contracting officer or, on appeal taken within 30 days, by the authorized representative of the head of the department (R. 230; see *supra*, p. 3). The contract also included, as Article 4, the standard "changed conditions" clause which authorized the contracting officer to provide for an increase in cost if the contractor encountered subsurface conditions of an unusual nature, differing materially from those ordinarily encountered (R. 229–230). In addition, the respondent acknowledged in the contract that it had satisfied itself as to the nature of the work, and "the character, quality and quantity of surface and subsurface materials to be encountered" (R. 231).

Included in the work to be performed was the construction of a 710-foot tunnel for the diversion of water, which was to be 17 feet in diameter before the placement of the concrete lining, and 13 feet in diameter afterward (R. 229). The construction of the tunnel, which constituted 6 to 7 percent of the work to be performed (R. 86), was intended to drain water from the dam's control pool, particularly when it had accumulated behind the dam at a high level (R. 127). It was to be drilled through almost solid rock, which was believed by the designer to be sufficiently strong to stand virtually without pressure on the tunnel (R. 127). For that reason the specifications did not call for any permanent ceiling support as protection for most of the tunnel, but they did state that "[t]emporary tunnel protection shall be provided where required for the safety of the workmen and shall be placed progressively after each heading blast" (R. 232). Because the rock at tunnel entrances is particularly prone to damage and failure, however, the specifications called for permanent tunnel protection for a 50-foot section at either end, consisting of steel arch ribs and corrugated steel liner plates and steel tie rods (R. 233–234). Cores of vertical drillings made at the site of the diversion tunnel were available to bidders on the contract, but neither respondent nor its tunnel-drilling subcontractor inspected the cores (R. 85, 118, 237).

Respondent's subcontractor began to drive the tunnel on December 12, 1940. Soon after the drilling commenced the subcontractor sought permission to use

some of the permanent steel liner intended for use on the inlet end of the tunnel as temporary tunnel protection for 16 feet beyond the first 50 feet of the outlet entrance. Such permission was granted, on the condition that the contractor bear any additional cost (R. 237–241). Except for those 16 feet, however, the subcontractor drilled the 610-foot center section of the tunnel without temporary overhead protection of any kind, and completed its work on March 25, 1947 (R. 241). During the period of drilling the tunnel, respondent's subcontractor experienced no unusual or harmful rock falls—merely the small rock falls that are normally expected (R. 117).

Respondent's schedule called for the installation of concrete beginning in mid-April 1947 (R. 85, 92). Since respondent had never previously engaged in the drilling or concreting of tunnels (R. 95), it requested the subcontractor which had drilled the tunnel to undertake the task of placing the concrete. That firm, however, was unable to do so because it had another job elsewhere (R. 92).

On April 10, 1947, respondent requested permission from the Resident Engineer of the Corps of Engineers to install permanent tunnel protection throughout the tunnel, with compensation. It gave as its reason the extremely hazardous conditions which it believed existed in the tunnel and the resulting dangers to its workmen (R. 242). The Resident Engineer replied that tunnel protection for the safety of workmen was clearly the responsibility of the contractor under the terms of the specifications, and

the fact that its subcontractor had driven the tunnel without any such protection did not relieve it of that responsibility (R. 242–243). Further correspondence resulted in a decision by the contracting officer dated May 5, 1947, that "no further tunnel lining will be placed at the expense of the Government;" he advised the respondent of its right to appeal from that decision within 30 days under the disputes clause of the contract (R. 245–247). The contracting officer did not prohibit respondent from installing tunnel protection at its own expense. Respondent took a timely appeal from that decision, which constitutes the basis for this litigation (R. 247).

Despite the provision of the disputes clause, which required respondent to proceed diligently with the work while an appeal was being prosecuted (R. 230; see *supra*, p. 3), respondent made no attempt to complete the tunnel during the spring and summer of 1947. After further conferences and correspondence, the contracting officer sent a letter dated June 13, 1947, advising respondent of the type of temporary protection he believed adequate. This protection, which had been suggested by respondent's subcontractor, consisted of steel "I" beam ribs, with timber lagging (R. 248–249). Respondent insisted upon permanent steel protection, however, of the kind employed in the first 50 feet of the tunnel from each entrance. On August 11, 1947, the acting district engineer of the Corps of Engineers advised respondent that "severe inexcusable delays are resulting from your failure to proceed." In substance, he told respondent to proceed with the kind of tunnel protec-

tion it believed appropriate, but advised respondent that the costs of such protection would be borne by it unless "higher authority" ruled otherwise (R. 253–254). Respondent began installation of tunnel supports on August 15, 1947, and completed them on October 8. Respondent did not begin to place the concrete until December 15, 1947, and did not complete it until May 8, 1948 (R. 296).

The time for completing the contract was extended by Modification No. 15 to June 30, 1949. The work was finished by that date, and formally accepted on July 20, 1949 (R. 229). On February 11, 1950, respondent executed, in consideration of final payment under the contract, a release of all claims arising out of the contract, except the claims presented before the Board and two other matters not pertinent here (R. 268–269).

2. *Proceedings before the Board.*—On respondent's appeal from the contracting officer's decision, the Claims and Appeals Board provided a full adversary hearing on June 17, 1948. Each side was represented by counsel, and each side introduced its evidence through exhibits and the testimony of witnesses, with full opportunity for cross-examination.

In his opening statement, counsel for respondent set forth the nature of the claim. He stated that the tunnel had already been lined with steel plates as permanent protection. He argued that respondent should be reimbursed for their installation because respondent believed that the character of the rock required such lining, and the character of the rock could not reasonably have been anticipated (R. 79–

80). He said nothing about the delay from April to December in beginning to install the concrete.

Although respondent had nine witnesses present (R. 74), it introduced the testimony of only four (R. 84). Respondent's supervisor, Mr. Coyne, gave the background information concerning the nature of the dispute (R. 84–91). After saying that this tunnel was the first he had worked on, he stated that installation of the concrete was not begun in April because of extensive rock falls occurring at that time (R. 94–96). He conceded that climatic conditions would have some tendency to deteriorate the rock in the tunnel, but gave his opinion that the deterioration in this instance was negligible (R. 93). Another engineer employed by respondent testified that approximately 200 cubic yards of rock fell in the tunnel from the end of March until October, with the greater portion falling in the first month (*i.e.*, March 2 to April 1) following the holing through (R. 103–106).

The Chief Engineer and Vice President of respondent's subcontractor, who had been in charge of driving the tunnel, testified that from the beginning he was afraid that his company would not be able to drill the tunnel without tunnel support for the roof (R. 110). Nevertheless, he stated that they experienced no rock falls while the tunnel was being driven from December through March, but that considerable falls, totalling 50 to 60 cubic yards, occurred during the clean-up period from March 12 to March 25, 1947 (R. 113–114, 241). When asked whether he thought that the total rock fall of 200 cubic yards

out of 6,000 cubic yards of excavation (approximately 3 percent) was excessive, he replied that he could not answer (R. 118).

Respondent's last witness was a geologist, who testified that he examined the tunnel on April 21 or 29, 1947, and that he found that the rock was shale, which contained parallel fractures, and that the rock fall was caused by the fractures (R. 122–123). He gave his opinion that a study of the core borings and of the specifications and drawings would not have disclosed the fractures (R. 122). In his opinion the introduction of air into the tunnel would be an insignificant factor in the rock fall (R. 123–124), but he stated that the unusually heavy rock falls in April were due to the thawing of the ground and heavy rains (R. 125). Lastly, he gave his opinion that if the tunnel had been lined with concrete without any support, some rock might have gone through the concrete and crashed to the floor (R. 125).

The government offered the testimony of three witnesses. The design engineer explained the general purpose and design of the tunnel (R. 126–134). He stated that most contractors provide overhead tunnel protection for their workers as they work, but that the specifications left it to the contractor to decide how to meet the situation encountered (R. 128).

A geologist with considerable tunnel experience testified that he examined the tunnel a number of times, the first being in June 1947. He made a contemporaneous report of his findings, which was incorporated into the record (R. 136–138). The geologist stated that he found the typical, normal

joints that were to be expected in sedimentary rock of this kind (R. 135–136). He gave his opinion that the rock fall which had occurred was due primarily to air of widely varying temperature and humidity, which caused contraction and expansion of the stone (R. 137–138). He believed that the falls would not have occurred if the rock had been protected against the thermal and humidity changes by sealing the tunnel openings, and "if concreting had been done soon after the completion of tunnel" (R. 138). His conclusion was that "[t]he fault lies in constructional delays and failure to understand and appreciate the type of rock" (R. 138). He explained that the natural ground temperature at the depth of the tunnel was 71 degrees, and that sedimentary rock of the type present in the tunnel is stable under that temperature and with normal humidity, but is very susceptible to disintegration under wide changes in temperature and humidity (R. 139–141). In his opinion all but 100 feet of the tunnel could have been lined with concrete without protection of any kind as late as June 1947, and that even the 100 feet could have been protected temporarily with steel beams and wood lagging (R. 141–144). He said that the installation of such temporary protection could have been accomplished in a few hours (R. 147).

The resident engineer also testified for the government that the installation of permanent tunnel protection would have been permissible under the specifications only if unstable rock had been found and that none had been encountered (R. 161). He

also testified that the first time respondent had the equipment necessary for installing concrete ready at the site of the tunnel was in August 1947 (R. 164).

Respondent offered no rebuttal testimony. Neither side presented any evidence as to damages because counsel had agreed that the question of damages would not be presented until liability was established (R. 217–219). Each side subsequently filed briefs. The government's brief stated that the estimated cost of placing the permanent lining was approximately $9,000 (R. 215).

On December 9, 1948, the Board found for the government (R. 167–177). Noting the sharp conflict in the testimony of expert geologists as to the cause of the rock falls (R. 173), the Board resolved the conflict in accord with the contemporaneous report of the government geologist. The Board emphasized respondent's long delay from March to December in beginning the placement of concrete (R. 175–176). It found specifically that, if proper measures had been taken to protect the interior of the tunnel from wide changes in temperature and humidity and "if the concreting had been started reasonably soon after holing out, the falls of rock and scaling off the walls would not have occurred" (R. 176). It also found that the vertical joints encountered at three locations and covering less than 100 feet could have been supported with relatively little temporary protection (R. 176). Although the question of damages was not before the Board, it noted in its opinion that respondent's claim was for the cost of the permanent steel protection, and that this cost was approximately $9,000 (R. 177).

Upon receiving the Board's decision, counsel for respondent wrote a letter to the Board pointing out that the $9,000 figure was apparently taken from the government's brief and that the claim was actually for $125,000 (R. 190–191). He stated that the Board's decision, by referring to the $9,000 sum as the amount of the claim, showed that it was written prior to the receipt of his reply brief. That brief had asserted that the $9,000 figure in the government's brief was erroneous, and that it had been agreed by counsel not to submit any evidence as to damages, but to remand the claim "to the Field" if the Board found for respondent (R. 190–191). He therefore asked for reconsideration on the basis of his reply brief (R. 191). The Board thereupon reviewed the entire record, considered the reply brief, and issued a supplementary opinion, adhering to its prior decision (R. 180–182).

3. *Proceedings before the Court of Claims.*—Respondent instituted this action by filing a petition in the Court of Claims on December 2, 1954, approximately 7½ years after the asserted breach of contract and the decision of contracting officer, and almost six years after the final decision of the Board (R. 1–12). The petition alleged that the contracting officer's decision was based upon erroneous conclusions of law involving the interpretation of the contract and specifications (R. 7), and that the decisions of that officer and the Board were "capricious," "arbitrary," and "so grossly erroneous as necessarily to imply bad faith" or were "not supported by substantial evidence" (R. 10–11). It sought damages for increased costs of $233,425.75 due to the delay in placing of the

concrete, plus a 15 percent profit on 8 out of the 9 cost items—for an aggregate claim of $259,721.87 plus interest (R. 11–12).

The case was heard on the issue of liability in September 1956 by a Commissioner. Government counsel took the position that no evidence was admissible before the court except for the record before the Board (R. 31–32). Counsel for respondent attempted to justify the introduction of additional evidence on the ground that the case involved questions of law concerning the interpretation of the contract specifications (R. 33). The Commissioner stated the issue was "whether or not there should be a trial de novo or * * * whether the Plaintiff is limited to what is shown by the administrative record," and decided to permit the introduction of evidence *de novo* (R. 34). Government counsel objected to all evidence which had not been before the Board (R. 53, 55, 56, 58, 59, 60, 62, 63, 64, 73).

At the trial, respondent introduced the testimony of 15 witnesses, including the five witnesses who were present, but did not testify, at the hearing before the Board (R. 74, 227). The government introduced the administrative record, as well as additional witnesses. The Commissioner made extensive detailed findings of fact, most of which were inconsistent with the findings of the Board, and concluded that the respondent was entitled to recover (R. 228–263).

The Court of Claims accepted the Commissioner's findings and conclusions. Although conceding that temporary protection might possibly have been suf-

ficient, it found that "it would not have been practical" to construct the tunnel with only temporary protection (R. 225), that the stability of the rock was not affected by its exposure to air (R. 227), and that "the Government officials felt they could save the Government money and at the same time subject the Government to no risk, by standing on the terms of the contract" (R. 226). It concluded that the condition of the rock was an unforeseen condition within the meaning of Article 4 of the contract, and that the government was under a contractual duty to pay the cost of remedying that difficulty (R. 226).

In response to the government's contention that the court was limited to consideration of the evidence before the Board, the court acknowledged that "some of the expert witnesses who did give important testimony in this court, did not testify before the Board" (R. 227). Nevertheless, it ruled (R. 227-228):

> In our opinion in *Volentine and Littleton* v. *United States*, 136 C. Cls. 638, holding that the trial in this court should not be limited to the record made before the contracting agency, but should be *de novo*, we recognized that there were logical weaknesses in our position. We concluded, however, that the intent of Congress in enacting the Wunderlich Act was in accord with our conclusion, and we adhere to that conclusion in this case.

Consequently, the court ruled "that *on consideration of all the evidence*, the contracting officer's decision cannot be said to have substantial support" (emphasis added) (R. 227).

After the court's decision on liability, respondent amended its petition to increase the alleged damages to $680,066.01 (R. 267). After receiving additional evidence on the question of damages, the court found that the entire delay from April to December 1947 was attributable to the contracting officer's failure to authorize the use of permanent tunnel protection, and that the respondent was entitled to all of its extra costs, including extra costs for placing the concrete in the winter (R. 301–303) and the fees of consulting engineers for their reports concerning the type of tunnel protection required (R. 303–304). The court further held that respondent was entitled to a profit of 15 percent on each of the elements of increased costs (R. 264–304). It rejected the government's contention that the release executed by respondent went to all of respondent's claims except those for the cost of placing permanent tunnel protection. Accordingly, it entered judgment for respondent in the amount of $149,617.36 (R. 265).

SUMMARY OF ARGUMENT

The Wunderlich Act, 41 U.S.C. 321, provides that administrative determinations of factual disputes arising out of government contracts are "final and conclusive," unless the determination is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." The government submits that judicial review of these administrative determinations of fact is limited to the administrative

record, except in cases of alleged fraud where extrinsic evidence may be necessary.

A. The language of the Act itself conclusively shows that, except in cases of alleged fraud, judicial review of administrative determinations of fact under the standard disputes clause is limited to the evidence before the administrative agency. A showing of fraud normally requires evidence outside the administrative record since it does not involve the merits of the controversy but events underlying the decision-making process. On the other hand, the decision of an administrative agency can be shown to be capricious, arbitrary, so grossly erroneous as to imply bad faith, or unsupported by substantial evidence only on the basis of the evidence which was before the agency. Other evidence, first presented in court, might show that the agency had inadvertently erred, but could not possibly show that it was capricious, arbitrary, or acting in bad faith when it acted reasonably on the evidence before it. Similarly, substantial evidence means evidence which a reasonable mind would accept to support a conclusion, and an agency cannot be shown to have acted unreasonably on evidence not before it.

B. The plain meaning of the language of the Wunderlich Act is supported by several other considerations. *First*, judicial review for arbitrariness and substantially evidence is customarily limited to a review of the record made before the administrative agency. This is true not only when Congress has spelled out in the statute the standards for judicial review, such as the substantial evidence test, but

even when the statute is silent on the subject. *E.g.*, *Tagg Bros.* v. *United States*, 280 U.S. 420, 433–434 (Packers and Stockyards Act); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 227 (Federal Communications Act). The only instances where judicial review is not limited to the administrative record is when Congress has specifically provided for a *de novo* trial.

Second, the legislative history of the Wunderlich Act shows that Congress rejected proposals for *de novo* trials and, instead, adopted a bill providing for limited judicial review. It utilized standards for review, such as arbitrariness and substantial evidence, to conform to the familiar standards of the Administrative Procedure Act and the National Labor Relations Act. The House Report makes clear that all the evidence necessary to the judicial determination must be offered at the administrative proceeding. H. Rept. No. 1380, 83d Cong., 2d Sess., pp. 4–5.

Third, every court of appeals and district court which has had the opportunity to rule on the issue has concluded that judicial review must be confined to the administrative record.

Fourth, judicial review of the administrative record is far more practical than to allow a completely new trial.

C. Respondent contends that the decision of the Court of Claims can be sustained on the ground that the dispute here, since it related to the terms of the contract, was one of law. However, it is well established that any dispute involving the interpretation of a contract or specifications, particularly when ex-

tensive evidence is required, is factual in nature and requires decision by the finder of fact. Moreover, the central issue here does not concern the interpretation of any contractual provision.

Respondent also suggests that the administrative agency committed procedural error justifying the Court of Claims in hearing new evidence. In fact, however, it is plain that the Board limited respondent's opportunity to present witnesses only because respondent desired to conclude the hearing in one day. Likewise, there is no indication that the Board based its decision on evidence outside the record. In any event, even if the Board committed a procedural error, this would not justify the Court of Claims in assuming the role of trier of fact, which the contract and the Wunderlich Act conferred on the administrative agency. The appropriate disposition would have been to stay the proceedings in the Court of Claims to allow the Board to hold a further hearing free from procedural error.

ARGUMENT

JUDICIAL REVIEW UNDER THE WUNDERLICH ACT OF ADMINISTRATIVE DETERMINATIONS OF FACT MADE PURSUANT TO THE DISPUTES CLAUSE OF GOVERNMENT CONTRACTS IS LIMITED, EXCEPT IN CASES OF ALLEGED FRAUD, TO THE ADMINISTRATIVE RECORD

The Wunderlich Act provides that administrative determinations of factual disputes arising out of government contracts are "final and conclusive," unless the determination is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply

bad faith, or is not supported by substantial evidence." The sole issue before this Court is whether a court reviewing administrative findings of fact, made pursuant to the standard disputes clause of government contracts, is restricted to a review of the administrative record, or is at liberty to determine that the administrative decision was improper on the basis of new evidence presented to the court. On the administrative record, it is clear that the administrative decision was fully supported by substantial evidence.[1] The Court of Claims, however, has ruled that it may disregard the administrative record and hear evidence *de novo*. In this case it therefore based its ruling that the administrative decision was not supported by substantial evidence upon new evidence introduced before the court.

A. THE PLAIN LANGUAGE OF THE WUNDERLICH ACT CONFINES JUDICIAL REVIEW TO THE EVIDENCE BEFORE THE ADMINISTRATIVE AGENCY EXCEPT WHERE FRAUD HAS BEEN ALLEGED

The Wunderlich Act, 42 U.S.C. 321, allows judicial review of administrative findings of fact only when the determination was "fraudulent or capricious or

[1] We also believe that the Board's determination is fully supported by the evidence even if the evidence introduced both before the Board and the Court of Claims is considered. The additional evidence introduced by respondent before the court merely provided support for the similar evidence contradicting the government's evidence, which it had introduced before the Board. This issue, however, involving the weighing of evidence, is not before this Court. The government petitioned for certiorari solely on the important legal question whether the Court of Claims was required to consider the factual determinations of the Board on the basis of the administrative record.

arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." We submit that except in the case of alleged fraud, this language means that the reviewing court can consider only the evidence before the administrative agency.

In the infrequent cases where government contractors allege that decisions of the administrative agencies are fraudulent,[2] determination of this issue will normally require the introduction of new evidence in the reviewing court. For a charge of fraud usually relates to events underlying the decision-making process. It has nothing to do with the record before the administrative agency which relates to the merits of the controversy under the contract.

In contrast, the other grounds for review relate solely to the factual record before the administrative agency. The agency can act capriciously or arbitrarily—which are essentially the equivalent of unreasonably—only on the basis of evidence which is presented to it. Even if the agency in fact erred—as evidence not before it might possibly show—it has not acted capriciously or arbitrarily when it has acted reasonably on the basis of evidence before it.

Similarly, it cannot be said on the basis of evidence not before the agency that a determination is "so grossly erroneous as necessarily to imply bad faith." In the legal sense, no error has been committed when a decision is made which is supported by the evidence

[2] "So fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or to be dishonest." *United States* v. *Wunderlich*, 342 U.S. 98, 100.

of record. The fact that other evidence might persuade one to another conclusion does not mean that a legal error has been committed. But even if this did constitute legal error, it surely cannot be said that an agency has acted "in bad faith" on the basis of evidence it did not even have the opportunity to consider.

Finally, the question whether the agency determination was supported by substantial evidence is also necessarily limited to the record before the agency. For the issue is whether the evidence actually underlying the determination was substantial, not whether other evidence might contradict it. Thus, this Court has held that substantial evidence is such evidence as would justify, in a trial by jury, a refusal to direct a verdict. *National Labor Relations Board* v. *Columbian Co.*, 306 U.S. 292, 300. As the Congressional committee which reported the Wunderlich Act in its final form stated (H. Rept. No. 1310, 83d Cong., 2d Sess., p. 4):

> As understood by the committee and as interpreted by the Supreme Court in *Edison Company* v. *National Labor Relations Board* (305 U.S. 197, 229), "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Again, even if other evidence might show that the determination was not correct, this would not constitute legal error or, at least, would not show that there was an absence of substantial evidence to support it.

Thus, the statute provides that the administrative decision is final if it is a decision which a fair and rea-

sonable person could make. The court's task on judicial review is therefore limited—except when fraud is alleged—to determining whether the agency properly performed its task of adjudicating the dispute, or acted arbitrarily and unreasonably. And whether the agency decision was reasonable or unreasonable must necessarily depend upon the evidence before it. Obviously, an agency cannot be condemned if it acted consistently with the evidence presented to it.

The illogic of the position of the Court of Claims is demonstrated by its action in this case. Each of the Board's findings of fact was fully supported by the testimony of expert and lay witnesses who had direct personal knowledge of the facts. See *supra*, pp. 10–12. From respondent's point of view, the most that can be said is that the evidence on its behalf before the administrative agency was in sharp conflict with the government's evidence. Accordingly, the Board's decision was supported by substantial evidence in the administrative record.[3] The Court of Claims did not purport to rule to the contrary. Instead, it concluded "that on consideration of all the evidence," including that introduced *de novo* before it, the contracting officer's decision cannot be said to have substantial support (R. 227).

In short, the very words of the Wunderlich Act demonstrate conclusively that administrative determinations of fact are judicially reviewable only on the basis of the evidence before the agency (except

[3] See, *e.g.*, *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229–231; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504.

in cases of alleged fraud). Since respondent does not claim that the Board or anyone else committed fraud, it was not entitled to present new evidence in the Court of Claims or to have the court decide the case on that basis.

B. JUDICIAL REVIEW IS CUSTOMARILY LIMITED TO THE ADMINISTRATIVE RECORD

The title which Congress chose for the Wunderlich Act was "An Act to permit review of decisions of the heads of departments, or their representatives or boards, involving questions arising under Government contracts." 68 Stat. 81. Similarly, the text of the Act precludes any provision of a government contract from "limiting judicial review" of such decisions in cases where fraud is alleged. From the language of the Act, it is therefore clear that Congress sought to permit judicial review of administrative decisions made pursuant to disputes clauses of government contracts. The terms "review" and "judicial review" imply that Congress sought to restrict the function of the courts to reviewing, or going over, the administrative decision and the evidence upon which it was based.

"Arbitrary," "capricious," and "substantial evidence" are terms which Congress has frequently used as standards for the judicial review of administrative decisions. Whenever Congress has provided for judicial review in accordance with those or equivalent standards, it has limited this review to the administrative record. *E.g.*, Administrative Procedure Act, 5 U.S.C. 1001, 1009 (see *O'Leary* v. *Brown-Pacific-*

Maxon, 340 U.S. 504, 508–509 (where review under the Longshoremen and Harbor Workers' Compensation Act was equated to that under the A.P.A.)); Fair Labor Standards Act, 29 U.S.C. 201, 210(a) (see *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126); Federal Trade Commission Act, 15 U.S.C. 41, 45(c) (see *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619); Indian Claims Commission Act, 25 U.S.C. 70s (b) (*Osage Nation of Indians* v. *United States*, 119 Ct. Cl. 592, 604, 97 F. Supp. 381, 387, certiorari denied, 342 U.S. 896); National Labor Relations Act, 49 Stat. 453, 29 U.S.C. (1946 ed.) 160(e), (f) (see *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 230); National Labor Relations Act, as amended, 29 U.S.C. 160(f) (see *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488).

In fact, even where Congress has simply provided for review, without setting forth the standards to be used, this Court has held that judicial review is limited to the administrative record. For example, in a district court proceeding to review a determination of the Secretary of Agriculture under the Packers and Stockyards Act, this Court held that the review was limited to the administrative record, although the statute (Section 316 of the Act, 7 U.S.C. 217, incorporating the Urgent Deficiencies Act by reference) was completely silent on this issue. *Tagg Bros.* v. *United States*, 280 U.S. 420, 443–444. The unanimous Court,

in an opinion by Mr. Justice Brandeis, ruled (*id.* at 443):

> A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo*. The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him * * *.

Similarly in a proceeding under Section 21 of the Longshoremens and Harbor Workers' Compensation Act (33 U.S.C. 921), where Congress provided that the compensation order of the Deputy Commissioner could be set aside "if not in accordance with law," the Court clearly indicated that review was to be upon the administrative record, with the exception of facts relating to constitutional rights.* *Crowell* v. *Benson*, 285 U.S. 22, 46–48. And in a district court proceeding to review an order of the Federal Communications Commission, this Court summarily rejected a contention that the district court should take evidence beyond the administrative record, although the statute did not prescribe standards for judicial review. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 227. Accord, *Acker* v. *United States*, 298 U.S. 426, 433–434 (Packers and Stockyards Act), *Louisville & N.R. Co.* v. *United States*, 245 U.S. 463, 466

* It is very doubtful that such an exception as to constitutional questions of fact exists in the law today. See, *e.g.*, *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38; *Morrison-Knudsen Corp.* v. *O'Leary*, 288 F. 2d 542, 543–544 (C.A. 9), certiorari denied, 368 U.S. 817; Davis, *Administrative Law* § 255; Schwartz, *Does the Ghost of Crowell* v. *Benson Still Walk*, 98 U. of Pa. L. Rev. 163. In any event, the factual issues involved in this case are plainly not of this kind.

(Urgent Deficiencies Act, of October 22, 1913, 38 Stat. 208).

When Congress has intended to permit the taking of evidence *de novo* in a court proceeding following an administrative decision, it has so specified in clear terms. In the Renegotiation Act of 1951, 50 U.S.C. App. 1218, Congress provided that "[a] proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo." Similarly, the Soil Bank Act, 7 U.S.C. 1801, 1831, states that "[t]he action in the United States District Court shall be a trial de novo * * *." See also, *e.g.*, Perishable Agricultural Commodities Act, 7 U.S.C. 499 (right to trial *de novo*, with the administrative award *prima facie* evidence).

In all of the many statutes in which Congress has provided for judicial review, we have been unable to find any under which the courts have received new evidence, except for those few which expressly call for a *de novo* trial. Under none of the numerous statutes providing for review under "substantial evidence" or equivalent standards have the courts admitted evidence in evaluating the correctness of the administrative decision. When Congress provided for judicial review in the Wunderlich Act on the same basis which it has followed in numerous other statutes—whether the administrative determination was arbitrary or unsupported by substantial evidence—it may reasonably be assumed, in the absence of contrary indications

from the legislative history, that Congress intended to use the same procedure as existed under those statutes. See *Marks* v. *United States*, 161 U.S. 297, 302–303. Here, moreover, as we will show below (pp. 28–32; see also *infra*, pp. 47–60), Congress deliberately chose settled terms for the standards of judicial review in order to equate the review of administrative decisions under government contracts to judicial review under the Administrative Procedure Act and the National Labor Relations Act, which limit judicial review to the administrative record.

C. THE HISTORY OF THE WUNDERLICH ACT SHOWS THAT CONGRESS DELIBERATELY UTILIZED THE CUSTOMARY STANDARDS OF JUDICIAL REVIEW TO PROVIDE FOR SUCH REVIEW ON THE ADMINISTRATIVE RECORD

The Court of Claims has conceded the logical weakness of its own rule. Nevertheless, that court has permitted the taking of evidence *de novo*, rather than a judicial review limited to the administrative record, because it believed that Congress, in adopting the Wunderlich Act, intended such a result. *Volentine and Littleton* v. *United States*, 136 Ct. Cl. 638, 145 F. Supp. 952; R. 227–228. In this part of our brief, therefore, we develop the background and legislative history of the Wunderlich Act. It would, of course, take the clearest kind of legislative history to overcome the clear intendment of Congress revealed by the language of the Act.

We show here not only that there is no legislative history to support the rule adopted by the Court of Claims, but that the legislative history overwhelm-

ingly supports our position that Congress intended review on the administrative record alone.

The background and legislative history of the Wunderlich Act are set out in detail in the Appendix, *infra*, pp. 47–60. It is sufficient here merely to summarize this material.

1. This Court long ago held that contract clauses making the decision of a particular person, such as an officer of the United States, final and conclusive as to factual issues were binding on the parties. The only exception, the Court ruled, was when the determination was fraudulent or "the mistake must have been so gross, or of such a nature, as necessarily implied bad faith." *Martinsburg & Potomac R.R. Co.* v. *March*, 114 U.S. 549, 553. Accord, *Kihlberg* v. *United States*, 97 U.S. 398; *United States* v. *Gleason*, 175 U.S. 588, 602; *Ripley* v. *United States*, 223 U.S. 695, 702, 704. After the Court of Claims in a series of cases had considerably expanded the scope of judicial review, this Court in *United States* v. *Wunderlich*, 342 U.S. 98, again held that the administrative determination was final in the absence of fraud or bad faith which was the equivalent of fraud.

After this Court's decision in *Wunderlich*, a subcommittee of the Senate Committee on the Judiciary held hearings on a bill sponsored by Senator McCarran, the Chairman of the Committee, which stated that no provision of any government contract should be construed to limit judicial review to cases of fraud. Hearings before a Subcommittee of the Senate Judiciary Committee, 82d Cong., 2d Sess., on S. 2487,

entitled "Finality Clauses in Government Contracts." The various witnesses appearing before the subcommittee supported the view that a standard for judicial review should be provided. The Comptroller General proposed a bill providing that the administrative decision be overturned only if it was "fraudulent, arbitrary, capricious, grossly erroneous, or that it is not supported by substantial evidence" (*id.* at p. 7). This or similar standards were supported by numerous government contractors. *Id.* at pp. 31, 123–124, 124–125, 125–130, 131–132. Some representatives of some contractors supported a *de novo* trial, including a Mr. Gaskins who noted that the bills being considered would not provide one (*id* at 32, 35, 82–84, 108). The Committee ultimately reported a bill similar to that proposed by the Comptroller General except as to the terminology defining the standards for judicial review. S. Rept. No. 1670, 82d Cong., 2d Sess., p. 1. The bill passed the Senate without debate (98 Cong. Rec. 9059), but was not acted on except as to the terminology defining the standards.

In the 83d Congress, Senator McCarran introduced S. 24, the same bill which the Senate had already passed. The Judiciary Committee reported the bill without further hearings. S. Rept. No. 32, 83d Cong., 1st Sess. The Senate again passed the bill without debate. 99 Cong. Rec. 6201.

During the hearings before the House Judiciary Committee on S. 24 and similar bills, considerable opposition developed to the Senate bill. In large part, this opposition was based on the fact that it applied untried and vague standards for judicial review, such

as "reliable, probative, and substantial evidence." Hearings before the House Judiciary Committee on H.R. 1839, and S. 24, H.R. 3634 and H.R. 6946, entitled "Review of Finality Clauses in Government Contracts," pp. 50, 93, 94, 97. Over the summer recess, therefore, representatives of industry associations and the government, under the Comptroller General's sponsorship, formulated a new bill eliminating novel terms from the standards prescribed for judicial review. In the hearings before the House Judiciary Committee on this bill, Mr. Gaskins made clear that only ordinary appellate review, not a *de novo* proceeding, would be permitted under the new bill. *Id.* at pp. 79–80. He stated that this bill had an important advantage for government contractors "because it will result in these various departments and agencies feeling that they will have to produce their witnesses at these hearings and permit the contractor to examine them, in order to support their decisions when they go up on appeal to the court." *Ibid.*

In reporting the Comptroller General's bill, the House Judiciary Committee reported that the standards for judicial review had been modified to conform to the standards of the Administrative Procedure Act and the National Labor Relations Act. H. Rept. No. 1380, 83d Cong., 2d Sess., p. 4. As Mr. Gaskins had suggested, the Committee stated that the substantial-evidence requirement of the bill would make each party present its side of the controversy and afford an opportunity of rebuttal in the administrative hearings. *Id.* at pp. 4–5. The House and then

the Senate approved the bill without opposition. 100 Cong. Rec. 5510–5511, 5717–5718.

In short, the legislative history of the Wunderlich Act shows that the Senate Judiciary Committee heard advocates of a *de novo* proceeding as well as those favoring a more limited judicial review. The Committee decided to adopt limited judicial review, and this decision, with some modifications, was ultimately accepted by Congress. In the House, this bill was deliberately changed to conform its standards of review to the familiar standards of the Administrative Procedure Act and the National Labor Relations Act. As we have seen above (pp. 24–27), these standards have uniformly been interpreted to provide for an appellate-type hearing on the administrative record and not to allow for the introduction of evidence *de novo*. The House Judiciary Committee selected these standards with full knowledge that the reviewing court would conduct an appellate-type hearing. The House Report made clear that all the evidence necessary to satisfy the standard of review must be presented at the administrative proceeding. Thus, the legislative history fully confirms the proposition that Congress intended the Wunderlich Act to provide for judicial review limited to the administrative record.

2. As we noted above (p. 28), the Court of Claims has conceded that there is logic in the view that judicial review under the Wunderlich Act for arbitrariness and substantial evidence should be limited to a review of the administrative record. *Volentine and Littleton* v. *United States, supra.* However, it be-

lieved that in passing the Wunderlich Act Congress merely sought to restore the law as the Court of Claims had applied it before the *Wunderlich* decision. "We think that those who agitated for the 1954 act, and the Congress which passed it, intended that, under the statute, we should go on as we had been doing before the Supreme Court's decision." *Volentine and Littleton, supra,* 136 Ct. Cl. at 642.

But the reasons relied upon by the Court of Claims do not support its conclusion. In the first place, it is not at all clear that, prior to the Wunderlich Act, the Court of Claims had consciously considered evidence not presented and not available to the administrative officers making the final administrative decision. The test formulated by the Court of Claims prior to the Wunderlich Act suggests strongly that such evidence was not considered relevant. For that court stated that it would upset the administrative decision only upon "facts and circumstances known to or available to" the decision maker. *Needles* v. *United States,* 101 Ct. Cl. 535, 606-607. Thus, even prior to the Wunderlich Act, it appears that the Court of Claims would not have considered evidence which the contractor did not present to the administrative decision-maker. Certainly, it would have had no rational basis for doing so, because it could upset a decision only if it was "so grossly erroneous as necessarily to imply bad faith." And bad faith of the administrative officer could obviously not be implied on the basis of evidence not known or available to him.

Secondly, Congress did not pass the Wunderlich Act simply to restore the *status quo*. It adopted the tests of arbitrariness, capriciousness, and substantial evidence, with the full knowledge that they precluded a *de novo* proceeding in the reviewing court. See *supra*, pp. 28–32. It consciously sought to equate judicial review of administrative decisions arising under government contracts to such review under the Administrative Procedure Act and National Labor Relations Act.

Although purporting to carry out the intent of Congress, the decision of the Court of Claims would result in frustrating at least one plain Congressional purpose. One of the purposes of Congress in using the substantial evidence test was to strengthen administrative procedures by requiring each side to make its case fully before the administrative agency (see *supra*, p. 31). Yet if the rule announced by the Court of Claims should become the law, the opposite result would follow. Rather than requiring each side to make its case fully before the administrative body, the holding of the Court of Claims would encourage each side to withhold relevant testimony in hope that it could show that the factual findings of the administrative body were unfounded. In this case, as noted above, the respondent introduced before the administrative board the testimony of only four of the fifteen witnesses whose testimony it presented to the court below. Sustaining the rule adopted below would encourage other contractors to do the same, and to make their real case before the courts. As one

court has put it, "the hearing before the Board would * * * constitute a time-consuming nullity." *United States* v. *Hamden Cooperative Creamery Co.*, 185 F. Supp. 541, 545 (E.D. N.Y.), affirmed, 297 F. 2d 130 (C.A. 2). The administrative proceeding would tend to lose its substance, and the courts would become the real finders of fact, in disregard of the evident intent of the contracting parties and the mandate of Congress expressed in the Wunderlich Act.

D. EVERY OTHER LOWER COURT WHICH HAS RULED ON THIS ISSUE HAS LIMITED JUDICIAL REVIEW TO THE ADMINISTRATIVE RECORD

In suits involving less than a $10,000 ceiling, the district courts have concurrent jurisdiction over claims arising under government contracts (28 U.S.C. 1346(a)(2)), and in suits by the government under such contracts have exclusive jurisdiction (28 U.S.C. 1345). Significantly the district courts and courts of appeals have uniformly refused to follow the Court of Claims' precedent.[5] Without exception, they have concluded that the reviewing court must confine its review to the administrative record and is not free to upset an administrative determination of fact on the basis of new evidence. *Allied Paint & Color Works, Inc.* v. *United States*, 309 F. 2d 133 (C.A. 2), pending on petition for a writ of certiorari, No. 774, this Term; *Wells & Wells, Inc.* v. *United States*, 269 F. 2d 412 (C.A. 8); *United States* v. *Hamden Cooperative Creamery Co.*, 185 F. Supp. 541 (E.D. N.Y.),

[5] The first holding of the Court of Claims on this issue was *Valentine and Littleton* v. *United States*, 136 Ct. Cl. 638, 650, 145 F. Supp. 952. Virtually all of the district court and court of appeals decisions cited in the text were decided after *Valentine and Littleton*, *supra*.

affirmed, 297 F. 2d 130 (C.A. 2); *Mann Chemical Laboratories, Inc.* v. *United States,* 174 F. Supp. 563 (D. Mass.); *United States National Bank of Portland* v. *United States,* 178 F. Supp. 910 (D. Ore.); *M. Berger Company* v. *United States,* 199 F. Supp. 22 (W.D. Pa.).*

E. JUDICIAL REVIEW ON THE BASIS OF THE ADMINISTRATIVE RECORD IS PRACTICABLE

In *Volentine and Littleton* v. *United States,* 136 Ct. Cl. 638, 145 F. Supp. 952, the Court of Claims indicated that it was impractical to rely solely on the administrative record. However, none of the difficulties which either the court or respondent has suggested actually exist. On the contrary, review on the basis of the administrative record is far more expedi-

* See also *Lowell O. West Lumber Sales* v. *United States,* 270 F. 2d 12 (C.A. 9); *United States* v. *A. J. McKinnon,* 289 F. 2d 908 (C.A. 9); *Hoffmann* v. *United States,* 276 F. 2d 199 (C.A. 10); *Langonia Lumber Corp.* v. *United States,* 140 F. Supp. 460 (E.D. Pa.), affirmed, 232 F. 2d 886 (C.A. 3); *L. W. Foster Sportswear Co.* v. *United States,* 145 F. Supp 148 (E.D. Pa.). But, cf. *Blake Construction Company, Inc.* v. *United States,* 296 F. 2d 393 (C.A. D.C.). In *Blake*, the court of appeals ruled that questions concerning the reformation of a contract were for judicial, and not administrative, determination. It therefore refused to limit the evidence in a suit for reformation to the administrative record. We think the better result would have been to consider the dispute as to the original intent of the parties a factual dispute arising under the contract. The decision, however, is based on the court's belief that a dispute as to the reformation of a contract does not arise under it and that the administrative agency lacked expertise on questions relating to reformation. The court there clearly indicated that on purely factual issues arising under the contract, such as whether "certain work is within the specifications of the contract," review would be limited to the administrative record. 296 F. 2d 393, 397.

tious and practical than allowing a completely new trial.

The Court of Claims suggested that there was often no adequate administrative record in government contract disputes. However, the legislative history of the Wunderlich Act makes clear that Congress intended that there be an administrative record containing all the evidence on which the administrative decision is based. H. Rept. No. 1380, 83d Cong., 2d Sess., p. 1; Hearings before the House Judiciary Committee on H.R. 1839, and S. 24, H.R. 3634, and H.R. 6946, p. 80. A full administrative record is essential to determine whether the administrative agency has violated the standards of the Wunderlich Act in evaluating the evidence. While the Court of Claims noted in *Volentine and Littleton* that the head of the department may delegate his power to decide contract appeals and that there is no power to compel the attendance of witnesses or the production of documents or put witnesses under oath, it does not follow that an adequate record may not be made. If such a record is not provided, this may constitute a procedural error requiring the Board to make a new determination (see *infra*, pp. 38–39).

The Court of Claims also suggested in *Volentine and Littleton* that the government's contention would necessitate two trials—first, on an inadequate administrative record and then on the full judicial record. On the contrary, we submit, it is the Court of Claims' rule which duplicates proceedings. An evidentiary proceeding is first held before the administrative agency. As we noted above (pp. 28–32), Congress intended that this be a full trial and that a complete

record be made. Under the Court of Claims' rule, however, this trial may be repeated if either party desires to introduce new evidence which it withheld, with or without reason, before the administrative agency. If, however, judicial review is restricted to the administrative record, only one evidentiary proceeding would be held in the large majority of cases where the administrative determination is supported by substantial evidence. In such cases, the court need merely review the administrative record like any court reviewing an administrative or lower court decision.

To be sure, there may be instances in which one or the other of the parties has failed to make an adequate record. It does not follow that a further evidentiary proceeding must invariably be held. In such situations it may often be possible to place the responsibility for the failure on the party who had the burden of proof on the issue involved. If it is determined that supplementary evidentiary proceedings should be permitted, there is no reason why the Board cannot be given the opportunity to conduct the further proceedings and correct the deficiency. In such instances, it would seem, the supplementary proceedings may ordinarily be confined to a particular segment of the case. Certainly it is poor judicial economy to attempt to meet this situation by giving both parties to a contract dispute an option to relitigate all of the issues in a case which they have already had one opportunity to present. There is no reason because the Board has erred for the reviewing court to take over the function of trier of fact which the contract

and the Wunderlich Act confer on the administrative agency. The courts of appeals do not hold trials when they find that a district court has erred in evaluating the evidence. Instead, they either enter judgment for one of the parties or remand for a new trial. The same is true when a district court or court of appeals reviews determinations of administrative agencies. If, as respondent suggests (Br. in Opp., p. 27), the Court of Claims does not have the power to remand the case to the administrative agency, there is no reason why it could not stay its proceedings pending a new administrative determination. See *Pennsylvania Railroad Co.* v. *United States*, 363 U.S. 202, 206.

F. THE TAKING OF EVIDENCE *DE NOVO* BY THE COURT OF CLAIMS CANNOT BE SUPPORTED ON THE GROUND THAT IT PERTAINED TO A QUESTION OF LAW

In the court below respondent attempted to justify the taking of evidence *de novo* on the ground that its claims involved a question of law, *i.e.*, a dispute as to the meaning of the specifications requiring respondent to furnish "temporary tunnel protection" (see R. 11, 33). In its brief in opposition in this Court, respondent similarly contended (pp. 29–30) that a question of law was involved because the government made a mistaken warranty in the contract concerning subsurface conditions in the tunnel and this constituted a breach of contract. We submit that these contentions are clearly without merit for two reasons.

1. This Court has stated, without deciding the issue, that "there is much to be said for the argument that

the 'interpretation' [of a contract] presents a question of fact." *United States* v. *Moorman*, 338 U.S. 457, 462. The view that the ascertainment of the objective meaning of the contract, as well as of the intent of the particular parties, may properly be characterized as a factual determination has been generally accepted. See 3 Williston, *Contracts* (rev. ed., 1936), § 616; Thayer, *A Preliminary Treatise on Evidence* (1898), pp. 202–207. Although the interpretation of written documents has been considered a function of the court where the interpretation does not depend upon proof of extrinsic circumstances or other evidence based upon intent (*Hamilton* v. *Liverpool Ins. Co.*, 136 U.S. 242, 255), the historical justification for this division of labor appears to have been the expertness of the judge in this field, rather than any distinction between "law" and "fact." See 3 Williston, *supra*, § 616; Thayer, *supra*, pp. 205–207.

The interpretation of technical provisions in contracts, specifications, plans, and drawings, is, of course, a matter particularly within the competence of the contracting officer and the other administrative officials. For this reason the parties to construction contracts often specifically agree that the decision of an architect or engineer shall be final as to the proper interpretation of plans and specifications.[1] In this case, for example, the disputed term "temporary tunnel protection" would have little, if any,

[1] See, *e.g.*, *Merrill-Ruckgaber* v. *United States*, 241 U.S. 387; *United States* v. *John McShain, Inc.*, 308 U.S. 512, 520; *United States* v. *Moorman*, 338 U.S. 457; *B–W Constr. Co.* v. *United States*, 101 Ct. Cl. 748, 768.

meaning to lawyers, judges, and laymen, apart from that customarily given it in the construction industry. If the factor of expertise is considered controlling in the distribution of functions, then, it would seem appropriate to leave the interpretation of contract plans and specifications primarily to the administrative officials. Such a division of function would be in accord with this Court's decisions in which deference has been given to the technical competence of administrative experts. *E.g.*, *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504; *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111; *Gray* v. *Powell*, 314 U.S. 402.

The Wunderlich Act contains a prohibition against making administrative determinations final on questions of law (41 U.S.C. 322, *supra*, p. 3). Congress, however, made no attempt in the statute or during the legislative deliberations to draw a line between issues of fact and issues of law. Thus, the Ninth Circuit has stated that under the Wunderlich Act the interpretation of specifications is a question of fact for the administrative officers. *United States* v. *A. J. McKinnon*, 289 F. 2d 908 (C.A. 9). See also *Salem Products Co.* v. *United States*, 298 F. 2d 808 (C.A. 2) (dictum); *Blake Construction Co.* v. *United States*, 296 F. 2d 393 (C.A. D.C.), discussed *supra*, p. 36, note 6. Contra, *Kayfield Const. Co.* v. *United States*, 278 F. 2d 217 (C.A. 2).

It is not necessary in this case, however, to reach the issue whether a dispute over the interpretation of contracts, plans, and specifications is ever an issue

of law, rather than one which is properly to be decided as a disputed fact under the standard disputes clause. For where extrinsic evidence, such as testimony as to the conduct of the parties, or industry custom and usage, is introduced to aid in the interpretation of a written instrument, it has long been settled that the dispute is a factual one for the trier of fact. *West* v. *Smith*, 101 U.S. 263, 269–270; *Rankin* v. *Fidelity Trust Co.*, 189 U.S. 242, 252–253; 3 Williston, *Contracts* (Rev. ed., 1936), § 616. As this Court said in *West* v. *Smith*, *supra*, 101 U.S. at 270:

> Doubtless the general rule is that it is the province of the court to construe written instruments; but it is equally well settled that where the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and extrinsic circumstances, the inference of fact to be drawn from the paper must be left to the jury, or, in other words, where the effect of a written instrument collaterally introduced in evidence depends not merely on its construction and meaning, but also upon extrinsic facts and circumstances, the inferences to be drawn from it are inferences of fact and not of law * * *.

These principles have been applied to the interpretation of government contracts containing standard disputes clauses under the Wunderlich Act. The lower federal courts have held that questions of interpreting the contract or the attached specifications and drawings are questions of fact for the administrative decision-maker if they depend upon extrinisic evidence. *Lowell O. West Lumber Sales Co.* v. *United States*,

270 F. 2d 12 (C.A. 9); *M. Berger Co.* v. *United States*, 199 F. Supp. 22, 26–27 (W.D. Pa.). See also *United States* v. *A. J. McKinnon*, 289 F. 2d 908 (C.A. 9). Compare *Kayfield Const. Co.* v. *United States*, 278 F. 2d 217 (C.A. 2) (where the parties' intent depended only upon the written instruments). Thus, in interpreting contract specifications and plans, or the contract itself, if either side wishes to introduce extrinsic evidence to show that its interpretation is in accord with the intent of the parties, the issue of interpretation is for the finder of fact. Since, as we have shown above (pp. 20–39), the administrative decision on such issues is final if supported by the evidence, there is no more justification for the reviewing court to take evidence *de novo* on questions of extrinsic facts relating to contract interpretation than there is on any other factual dispute.

2. In any event, the disagreements as to the meaning of the requirement in the specifications that the respondent provide temporary tunnel protection and the provisions in the contract as to subsurface conditions are not critical here. The basic dispute was whether permanent steel protection, of the kind required for the first 50 feet, was necessary for the interior section of the tunnel because the weathered and unstable condition of the rock was unforeseen. The Board found that the concrete lining could have been placed promptly in April without any permanent protection and with relatively little temporary protection; that the rockfalls were caused not by any unforeseen condition of the rock, but by failure to proceed promptly with the placement of the concrete;

and that there were no changed or unanticipated conditions (R. 175–176). These findings of fact—which, as we have noted above (p. 23), are supported by substantial evidence in the administrative record—are sufficient to require a judgment for the United States, regardless of any dispute as to the meaning of the term "temporary tunnel protection" or any provision in the contract. The decision of the Court of Claims was based on disagreement with these findings, not on interpretation of the contract. Thus, even if disputes as to the interpretation of contracts and specifications are questions of law fully reviewable in the courts, no such question is presented here.

G. THE BOARD COMMITTED NO PROCEDURAL ERROR REQUIRING THE COURT OF CLAIMS TO HEAR EVIDENCE *DE NOVO*

Respondent suggested in its brief in opposition that the Court of Claims was justified in hearing new evidence because the Board had committed procedural error. It contended that the Board did not allow respondent to present its full case (pp. 6–7) and went outside the record in making its determination (pp. 6, 27–28). We submit that the Court of Claims did not base its decision to hear new evidence on this ground and, furthermore, that both claims are factually without basis. In any event, even if the allegations were factually correct, the Court of Claims should have allowed the Board to make a new determination following proper procedures instead of assuming the role of trier of fact.

It is plain that respondent had the opportunity to present its full case before the Board. The Board limited respondent's presentation of witnesses only because respondent itself requested that the hearing be concluded in one day (R. 108). Since the Board normally adjourns at 5 p.m., the Board limited respondent's presentation in order to allow the government time to present its case (R. 109). At no point did respondent object before the Board that it was being deprived of opportunity to present witnesses (see R. 126).

All the evidence relied on by the Board was included in the record and therefore made known to respondent. Respondent's contrary argument that two letters (see R. 183–189) were relied on by the Board rests entirely on the fact that they state that the amount claimed in respondent's appeal was $9,000 and this amount appeared in the Board's decision. The $9,000 figure concerning the amount of damage claimed had nothing whatever to do with the Board's determination that the government was not liable. Moreover, this figure was contained in the government's brief which was submitted to the Board (see *supra*, pp. 12–13). The documents respondent refers to were transmittal letters accompanying the files from the contracting office to the chief of the Corps of Engineers. The practice is to give the files and the accompanying letters to the government counsel, instead of to the Board. See Hearings before the Senate Judiciary Committee on S. 2487, 82d Cong., 2d Sess., pp. 93, 102. In the absence of any indica-

tion of the contrary it must be presumed that the administrative agency acted with procedural regularity.

Even if the Board made procedural errors which would warrant a reviewing court in overturning the decision, the court should still not hear evidence *de novo*. The administrative agency, not the courts, have been designated as the trier of fact, both by the contract and the Wunderlich Act. Consequently, as argued above (pp. 38–39), if a reviewing court finds that an administrative determination is arbitrary or otherwise unsupported by the evidence, it should enter judgment for the plaintiff or afford the administrative agency the opportunity to hold a further hearing. The case is even stronger for allowing the administrative agency to correct its mistake when the court finds that it has committed a procedural error.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed.

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APPENDIX

THE BACKGROUND AND LEGISLATIVE HISTORY OF THE WUNDERLICH ACT

1. *The Law Prior to the Act.*—Government contract clauses which make the decision of an officer of the United States final and conclusive on both parties in disputes arising out of the contract have a long history. Generally, they were designed to provide for an expeditious resolution of factual disputes by persons familiar with the technical problems which frequently arise. In 1878 this Court upheld such a clause which made the determination of a chief district quartermaster binding as to the distances which governed the contractor's claims for transportation services. *Kihlberg* v. *United States*, 97 U.S. 398. Since there was neither allegation nor proof of bad faith on the part of the quartermaster, and no showing of anything other than an honest purpose to discharge the duty conferred upon him by mutual assent, the Court ruled that his estimates could not "be subjected to the revisory power of the courts without doing violence to the plain words of the contract." *Id.* at 401. The Court pointed out that the provision was designed to avoid frequent disputes which might give rise to vexatious and expensive litigation.

Soon thereafter, the Court upheld a similar clause in a contract between private parties, in which an employee of one of the parties was the finder of fact. *Martinsburg & Potomac R.R. Co.* v. *March*, 114 U.S. 549. The Court ruled that the findings of the de-

fendant's engineer were final and conclusive unless he was guilty of fraud or intentional misconduct. *Id.* at 553. A charge to the jury that the final estimate of the engineer could be set aside if it was the product of the engineer's "gross mistake" was held to be erroneous on the ground that the parties did not reserve the right to revise his determination for mere errors or mistakes. *Id.* at 553, 554. The jury should have been informed, the Court stated, that "the mistake must have been so gross, or of such a nature, as necessarily implied bad faith." *Id.* at 553. This rule, relating to contract provisions making a decision of a person final and conclusive, was subsequently reaffirmed by this Court. *United States* v. *Gleason*, 175 U.S. 588, 602; *Ripley* v. *United States*, 223 U.S. 695, 702, 704.

Following these decisions the Court of Claims set aside administrative findings under disputes clauses only for bad faith, or such gross error as would necessarily imply bad faith. Over the years, however, it began to broaden the tests and to upset administrative decisions where it believed them to be arbitrary or grossly erroneous, although not actually the result of bad faith.[8]

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[8] See, *e.g.*, *Kennedy* v. *United States*, 24 Ct. Cl. 122 (1889); *Savage Construction Co.* v. *United States*, 47 Ct. Cl. 298 (1912); *Griffiths* v. *United States*, 77 Ct. Cl. 542 (1933); *Southern Shipyard Corp.* v. *United States*, 76 Ct. Cl. 468 (1932), certiorari denied, 290 U.S. 640; *S. J. Groves & Sons Co.* v. *Warren*, 135 F. 2d 264 (C.A. D.C.) (1943), certiorari denied, 319 U.S. 766; *Needles* v. *United States*, 101 Ct. Cl. 535 (1944). In the *Needles* case, the Court of Claims formulated its rule in the following terms (*id.* at 606–607): "* * * such gross error will justify the court in upsetting the decision if the extent of the gross error and the character thereof is shown by proof of facts and circumstances known to or available to the officer

The Court of Claims also adopted several other rules which had the effect of limiting the effect of the administrative decision. The result was a series of decisions by this Court, reversing judgments of the Court of Claims which had set aside or ignored the administrative decision. For example, in *John McShain, Inc.*, v. *United States*, 88 Ct. Cl. 284, the Court of Claims overruled a contracting officer, on the ground that the parties wer incompetent to contract to make his decisions binding in regard to interpreting the contract drawings and specifications. This Court reversed, *per curiam*, citing two of its prior decisions (*Plumley* v. *United States*, 226 U.S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U.S. 387, 393) holding such disputes clauses applicable to contract specifications. *United States* v. *John McShain, Inc.*, 308 U.S. 512*

Similarly, the Court of Claims ruled that a contractor need not take an administrative appeal of its claim for an equitable adjustment for additional work under a disputes clause relating to all questions of fact because such a claim concerned only questions of law. *Callahan Walker Construction Co.* v. *United States*, 95 Ct. Cl. 314. This Court again reversed, holding that the dispute was one of fact. *United States* v. *Callahan Walker Construction Co.*, 317 U.S. 56. The Court reversed two decisions of the Court of Claims, holding that a contractor could ignore a contracting officer's decision under an "all disputes"

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to have been inconsistent with good faith—that is, wholly inconsistent with the kind of a decision which a fair-minded person would have reached upon a candid, reasonable, and impartial consideration of all the known and available relevant facts and data."

* See this Court's discussion of this case in *United States* v. *Mourman*, 338 U.S. 457, 461.

clause, fail to take an administrative appeal thereunder, and obtain a judgment on the dispute contrary to the contracting officer's decision. *United States* v. *Blair*, 321 U.S. 730; *United States* v. *Holpuch Co.*, 328 U.S. 234. Shortly thereafter, the Court reversed a decision of the Court of Claims which overturned a decision of an authorized representative of the Secretary of War on a question of contract interpretation. *United States* v. *Moorman*, 338 U.S. 457. While acknowledging that "there is much to be said for the argument that the 'interpretation' here presents a question of fact," the Court did not reach that question because even if the dispute was one of law it was covered by a specific provision in the specifications. *Id.* at 462–463.

In *United States* v. *Wunderlich*, 342 U.S. 98, the Court of Claims set aside an administrative decision of a factual dispute under the standard disputes clause as "arbitrary," "capricious," and "grossly erroneous." This Court reversed, holding that, under its prior decisions, the administrative determination was final in the absence of fraud, or bad faith which is equated to fraud. "By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. * * * If the standard of fraud that we adhere to is too limited, that is a matter for Congress." *Id.* at 100.

2. *The Legislative History of the Wunderlich Act* [10]— a. The decision in *Wunderlich* led to a reexamination by Congress of the extent to which admin-

[10] For the history of Wunderlich Act, see Schultz, *Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle Over the Wunderlich Case*, 67 Harv. L. Rev. 217; Braucher, *Arbitration under Government Contracts*, 17 Law & Contemp. Prob. 473; Cable, *The General Accounting Office and Finality of Decisions of Government Contracting Officers*, 27 N.Y.U. L. Rev. 780.

istrative decisions regarding contractual disputes should be final. Several bills were introduced to change the result in *Wunderlich* by broadening the grounds for which the courts could set aside the administrative decision. S. 2432 and 2487, and H.R. 6214, 6301, and 6838, 82d Cong., 2d Sess.

In February and March 1952, a subcommittee of the Senate Judiciary Committee held hearings on S. 2487, which was introduced by its chairman, Senator McCarran. Hearings before a Subcommittee of the Senate Judiciary Committee, 82d Cong., 2d Sess., on S. 2487, entitled "Finality Clauses in Government Contracts" (hereafter referred to as "Senate Hearings"). As originally drafted, Senator McCarran's bill simply stated that no provision of any government contract should be construed to limit judicial review to cases in which fraud is alleged.[11] *Id.* at p. 1.

In commenting upon the McCarran bill, the Comptroller General pointed out that in the contractual provision for "administrative finality on questions of fact can be a useful device leading to the reasonably satisfactory settlement of many contractual contro-

[11] "A BILL To permit judicial review of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no provision of any contract entered into by the United States relating to the finality or conclusiveness of any decision of the Government contracting officer, or of the head of the department or agency of the United States concerned or his representative, in a dispute involving a question of fact arising under such contract, shall be construed to limit judicial review of any such decision only to cases in which fraud by such Government contracting officer or such head of department or agency or his representative is alleged."

versies," since most of the disputes concern the quantity and quality of materials, whether the work performed meets the requirements of specifications, and like issues of fact requiring highly specialized, technical, or professional knowledge. Senate Hearings, p. 5. He also believed it would be "a serious mistake" for Congress to enact legislation without clarifying the standards for action by the courts and the General Accounting Office. *Id.* at p. 6. He thought the results of the decisions in *Moorman*[12] and *Wunderlich* undesirable, however, and urged that Congress change them. *Id.* at pp. 5–6. He therefore recommended that Senator McCarran's bill be modified to outlaw any contract provision making administrative decisions final as to questions of law, and to allow the courts and the General Accounting Office to set aside an administrative decisions under disputes clauses only upon a finding that the decision was "fraudulent, arbitrary, capricious, grossly erroneous, or that it is not supported by substantial evidence."[13] *Id.* at p. 7. His representative testified that the bill proposed by the Comptroller was designed to give the courts

[12] The objection to the result in *Moorman* was to leaving decisions on questions of law to administrative officers.

[13] The Comptroller stated (Senate Hearings, p. 7): "In lieu of the bill S. 2487, it is urgently recommended that there be enacted a bill providing substantially as follows:

"'No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative or board. Any stipulation in a Government contract to the effect that disputed questions shall be finally determined by an administrative official, representative or board shall not be treated as binding if the General Accounting Office or a court finds that the action of such officer, representative or Board is fraudulent, arbitrary, capricious, grossly erroneous, or that it is not supported by substantial evidence.'"

and his Office "their normal and proper jurisdiction." *Id.* at p. 11.

A representative of the Associated General Contractors of America, testifying on behalf of the construction industry, urged that the result of the *Wunderlich* decision be changed so that the administrative decisions "should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both contracting parties, and supported by the evidence upon which such decision was based." Senate Hearings, p. 29. His language was almost identical to that contained in a resolution adopted by his organization. *Id.* at pp. 113-114. He stated that the views of his organization were very close to those of the General Accounting Office. *Id.* at p. 31.

Mr. Gaskins, a lawyer who had represented the contractor in the *Wunderlich* case, urged that there should be a *de novo* trial as in Tax Court proceedings in renegotiation cases. Senate Hearings, p. 33. He suggested that review to determine whether an administrative decision was "arbitrary, or capricious, or grossly erroneous, or was not supported by substantial evidence" was "not in conformity with my recommendation that there should be a *de novo* review," but indicated that such relief would be adequate, if Congress was not inclined to go further. *Id.* at pp. 35, 66. Another witness also supported this approach, but he conceded that the bill proposed by the General Accounting Office would afford sufficient relief. *Id.* at pp. 82–84.

The proposal for a *de novo* trial was later incorporated in a draft bill formulated by some government contractors, which precluded the inclusion in

contracts of disputes or finality clauses."[14] Senate Hearings, p. 108. Apparently recognizing that this position was not likely to prevail, they urged in the alternative a bill which, like the proposal of the Comptroller General, would have allowed the courts to set aside administrative decisions, if fraudulent, arbitrary, capricious, grossly erroneous, or not supported by substantial evidence. *Id.* at p. 107.

Other representatives of government contractors testified in opposition to the proposal for *de novo* proceedings, on the ground that such suggestions were getting "beyond the purpose of the legislation that is before you. * * * To attempt to go further might invite defeat." Senate Hearings, pp. 57–58. See also *id.* at pp. 61–62. Various organizations of contractors expressed their views in favor of bills for judicial review of administrative decisions to determine whether they were "arbitrary," or "capricious," or "not supported by substantial evidence."[15]

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[14] The key clause of the proposed bill provided (Senate Hearings, p. 108):

"No contract entered into by the United States shall contain, nor shall the jurisdiction of the United States Court of Claims (or of the United States district courts within the limits presently prescribed) to hear, determine, and enter judgment upon any claims arising out of such a contract be restricted by any provision making the decision of an officer, board, or other representative of the executive branch of the United States final and conclusive upon disputed questions arising under the contract."

[15] American Road Builders Association ("arbitrary rulings"), Senate Hearings, pp. 123–124; National Canners Association ("arbitrary," "capricious," and "grossly erroneous"), *id.* at pp. 124–125; National Association of Manufacturers ("Fraudulent, arbitrary, capricious, grossly erroneous, or is not supported by substantial evidence"), *id.* at pp. 125–130.

A representative of the Department of Defense testified that the disputes clauses provided for an inexpensive and expeditious means of resolving disputes. Senate Hearings, pp. 89–90, 92. He also attacked the McCarran bill as failing to provide any standards for judicial review. *Id.* at 92. Similarly, a representative of the second largest contracting agency of the federal government, the General Services Administration, defended the disputes clauses, and opposed the suggestion for a *de novo* judicial proceeding. *Id.* at pp. 96–99. He pointed out that in his agency, as in the Department of Defense, the contractor prevailed on administrative appeal from the contracting officer's decision in about 50 percent of the cases. *Id.* at p. 97.

The Senate Judiciary Committee recommended a bill which was substantially the same as the Comptroller General's proposed bill.[16] S. Rept. No. 1670, 82d Cong., 2d Sess., p. 1. The stated purpose of the bill was "to overcome the inequitable effect," under the *Wunderlich* decision, of the disputes clauses of government contracts. *Id.* at pp. 1–2. In a very short report, the Committee indicated that the bill would have the effect of allowing the courts to correct mistaken administrative decisions for reasons other than conscious wrongdoing. *Id.* at p. 2. On the floor, the bill was passed by the Senate without discussion or debate. 98 Cong. Rec. 9059.

b. At the beginning of the 83d Congress, Senator McCarran introduced as S. 24 the same bill which had passed the Senate in the prior Congress. The Senate Judiciary Committee reported the bill favorably,

[16] To the standards of review, the Committee added "so mistaken as necessarily to imply bad faith," deleted "arbitrary" and "capricious," and substituted "not supported by reliable, probative, and substantial evidence" for "not supported by substantial evidence."

without any further hearings, in a report which was almost identical with its report the prior year. S. Rept. No. 32, 83d Cong., 1st Sess. On the floor of the Senate, Senator McCarran stated that, under the *Wunderlich* decision, the language of disputes clauses in government contracts would operate in almost every case to preclude judicial review, and that his bill was designed to change that result. 99 Cong. Rec. 6201. Again the Senate passed the bill, without debate, and apparently without opposition. *Ibid.*

c. The House Judiciary Committee then scheduled a hearing on the Senate bill as well as on various bills submitted in the House. Hearings before the House Judiciary Committee on H.R. 1839, and S. 24, H.R. 3634, and H.R. 6946, entitled "Review of Finality Clauses in Government Contracts" (hereafter referred to as "House Hearings"). By the date of the hearings (July 30, 1953), however, considerable opposition had arisen to the Senate bill. For example, the Aircraft Industries Association, composed of the large aircraft and missile concerns, and the Automobile Manufacturers Association opposed the Senate bill as drafted because of the authority it gave the General Accounting Office to upset agency decisions, and because of the introduction of untried and vague standards of judicial review, such as "reliable, probative, and substantial evidence." *Id.* at pp. 93, 94, 97. A representative of the Department of Justice objected to the terms "grossly erroneous" and "reliable, probative, and substantial evidence" as ambiguous. *Id.* at p. 50. He suggested that, in light of the Senate report, such ambiguities in the Senate bill might even permit a *de novo* hearing. *Id.* at p. 51. Congressman Walter, the Chairman of the Judiciary Committee, commented that the bill provided for broader judicial review than the substantial-evidence

rule laid down in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229. House Hearings, p. 51.

Over the summer recess representatives of industry associations and the government met under the auspices of the General Accounting Office. A substitute bill was drafted to meet the objections to the Senate bill, by eliminating any reference to the General Accounting Office and from the standards for judicial review novel terms, such as "grossly erroneous" and "reliable, probative, and substantial evidence." House Hearings, pp. 97–98. The Comptroller General then incorporated the substitute bill in a letter to the chairman of the House Judiciary Committee, who sponsored it in the House. *Id.* at pp. 34–35.

Most of the witnesses appearing before the Committee either supported the Comptroller General's new bill, or did not oppose it. A representative of the General Services Administration, who had objected to *de novo* proceedings during the Senate hearings (p. 99), raised the question whether review for arbitrariness, etc., might be *de novo*, even though on the question of substantial evidence, the reviewing court would be sitting as an appellate body. House Hearings, p. 59. When Mr. Gaskins, the attorney who had supported the *de novo* approach before the Senate Judiciary Committee (see *supra*, p. 53), was asked his view on the various bills before the House Committee, he stated that "I do not see how they could possibly result in a *de novo* review • • •." House Hearings, p. 79. When pressed as to whether under the proposals, review would be *de novo* or appellate, he answered that "It will be an appellate review." *Ibid.* He noted, however, that the new bills would be an

improvement over the situation before the *Wunderlich* decision (*id.* at pp. 79–80):

> It will have this additional advantage, which I think is very real: All of the bills that are before the committee today, including the Comptroller General's proposed draft, with the single exception of Representative Celler's bill, add the statement that the decision must be supported by substantial evidence. Now, that will be of very great value to contractors, because it will result in these various departments and agencies feeling that they will have to produce their witnesses at these hearings and permit the contractor to examine them, in order to have in the record some substantial evidence to support their decisions when they go up on appeal to the court. I do not feel that they will any longer run the risk of refusing to put their proof in the record where it will be exposed to the cross-examination of the contractor.

He pointed out that the substantial evidence test was contained in the Administrative Procedure Act. *Id.* at p. 80.

A representative of the American Bar Association suggested a bill which would have made administrative decisions on contracts disputes reviewable under the Administrative Procedure Act. House Hearings, pp. 88–91. He objected to the vague and untried standards of review contained in the Senate bill and some of the House bills. Another witness testified to the same effect. *Id.* at pp. 114–119. Finally, a representative of the Department of Defense stated that if the Committee believed legislation necessary, the Department would be satisfied with the Comptroller General's new bill. *Id.* at p. 123.

The House Judiciary Committee adopted the Comptroller General's substitute bill intact, noting that it

had been "favored by practically all the witnesses," including those who formerly opposed the bill. H. Rept. No. 1380, 83d Cong., 2d Sess., p. 2. The report stated that the legislation was called for, because it was not in the interests of the government or the contractors to leave to administrative officers the final decision on questions of law or fact. *Id.* at pp. 2–4. It noted the modification of the standards of review, and the precedent for the standards of arbitrariness, capriciousness, and substantial evidence in the Administrative Procedure Act. "There is a wealth of judicial precedent behind these standards of review and it is the committee's belief that they should not be abandoned." *Id.* at p. 4. The Committee noted that the test for "substantial evidence" had been laid down by this Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." House Hearings, p. 4. Except for the change in the standards of review the Committee made it clear that the bill was not intended to confer on the contractor any new rights. *Id.* at p. 6. Following Mr. Gaskins' suggestion (*supra*, pp. 57–58), the Committee noted (*id.* at pp. 4–5):

> The inclusion of the standard "not supported by substantial evidence" should also correct another condition arising out of the lack of uniformity between the various departments and agencies concerned in the appellate hearing procedures under the disputes clause. It has been brought to light in public hearings that it is the exception rather than the rule that contractors in the presentation of their disputes are afforded an opportunity to become acquainted with the evidence in support of the Government's position. It is believed that if

> the standard of substantial evidence is adopted this condition will be corrected and that the records of hearing officers will hereafter contain all of the testimony and evidence upon which they have relied in making their decisions.

The administrative hearings would be held "so as to require each party to present openly its side of the controversy and afford an opportunity of rebuttal." *Id.* at p. 5.

On the floor of the House, the manager of the bill noted that the Comptroller General's suggestions were adopted by the Committee. The House passed the bill without debate, and apparently without dissent. 100 Cong. Rec. 5510–5511.

d. In the Senate, Senator McCarran urged the passage of the Comptroller General's bill, after being assured that it would adequately protect contractors' rights to judicial review. 100 Cong. Rec. 5717. The Senate thereupon concurred in the House amendment, again without apparent opposition. *Id.* at 5718.

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